Commercial Activities Legal Lessons Learned

6 March 2003

ISSUE: JONES-HILL GAO DECISION

(B-286194.7 Reconsideration, 2002)

- LESSONS LEARNED
  - PRIOR TO BEGINNING OF STUDY ENSURE THAT PWS AND ME TEAMS ARE INDEPENDENT AND DO NOT OVERLAP
  - FAR 9.5 GENERALLY PRECLUDES AN OFFEROR FROM COMPETING WHEN THE OFFEROR:
    - PREPARES THE STATEMENT OF WORK
    - EVALUATES PROPOSALS SUBMITTED
    - OBTAINS INFORMATION THAT PROVIDES UNFAIR COMPETITIVE ADVANTAGE

ISSUE: JONES-HILL GAO DECISION

- JONES-HILL DECISION APPLIES FAR 9.5 TO THE GOVERNMENT AS WELL AS TO OTHER OUTSIDE OFFERORS
- ALWAYS KEEP ABREAST OF CHANGES TO THE REGULATIONS BASED ON GAO DECISIONS, COURT DECISIONS AND CHANGES TO THE REGULATIONS

ISSUE: JONES-HILL GAO DECISION

- LESSONS LEARNED
  - BE PREPARED TO STOP OR DELAY THE PROCESS TO ACCURATELY ASSESS CHANGES AND APPLY THEM APPROPRIATELY
  - LOOK FOR GUIDANCE FROM THE NAVY STRATEGIC SOURCING TEAM

ISSUE: HOW TO DEFINE SCOPE OF WORK INCLUDED IN A STUDY

- LESSONS LEARNED
  - IN PREPARING THE PWS AND MEO OTHER POSITIONS MAY HAVE TO BE ELIMINATED OR MAY RESULT IN DUPLICATION OF EFFORTS
  - OTHER PERSONNEL ACTIONS, OUTSIDE THE CA STUDY MAY ALSO BE NECESSARY, I.E. REASSIGNMENT, RIFS

ISSUE: HOW TO DEFINE SCOPE OF WORK INCLUDED IN A STUDY

- MEO SUBCONTRACTS
  - DETERMINE IN ADVANCE IF SUBCONTRACT WILL BE INCLUDED IN PWS/MEO OR WHETHER GOVERNMENT WILL CONTINUE TO DIRECTLY CONTRACT FOR THE WORK

ISSUE: HOW INVOLVED CAN AN EMPLOYEE BE IN THE PWS/MEO PROCESS AND STILL RESERVE HIS RIGHT OF FIRST REFUSAL

- LESSONS LEARNED
  - BE CAREFUL TO RESTRICT THE INVOLVEMENT OF EMPLOYEES AFFECTED BY THE CA STUDY TO PROVIDING INPUT ONLY TO THE TEAM ACTUALLY PREPARING THE PWS
  - PROVIDE ETHICS BRIEFINGS TO EXPLAIN THE VARIOUS REGULATIONS TO EMPLOYEES

ISSUE: HOW INVOLVED CAN AN EMPLOYEE BE IN THE PWS/MEO PROCESS AND STILL RESERVE HIS RIGHT OF FIRST REFUSAL

- LESSONS LEARNED
  - BRIEF THE EMPLOYEES WHO WANT TO “DEVELOP” THE PWS AND HAVE THEM ACKNOWLEDGE IN WRITING THEIR UNDERSTANDING OF THE RULES INVOLVED AND THE POTENTIAL RISKS

ISSUE: LABOR AGREEMENTS AND WORK FORCE CHANGES RESULTING FROM PWS/MEO PROCESS

- LESSONS LEARNED
  - THE A-76 CIRCULAR REQUIRES UNION OFFICIALS TO BE KEPT INFORMED ON A MONTHLY BASIS. IT IS IMPORTANT TO HOLD MONTHLY MEETINGS AND ENCOURAGE UNION OFFICIALS AND EMPLOYEES TO ATTEND
  - THE LABOR AGREEMENTS SHOULD BE REVIEWED TO DETERMINE RIGHTS OF THE UNION IN THE CA PROCESS

ISSUE: LABOR AGREEMENTS AND WORK FORCE CHANGES RESULTING FROM PWS/MEO PROCESS

- LESSONS LEARNED
  - THE RESULTS OF THE UNIONS RIGHTS RELATIVE TO A-76 SHOULD BE PROVIDED TO UNION AND EMPLOYEES
  - UNION SHOULD BE ADVISED OF THE ROLE IT IS TO PLAY IN CA PROCESS. GUIDANCE PROVIDED IN SUCCEEDING AT COMPETITION: GUIDE TO CONDUCTING COMMERCIAL ACTIVITIES STUDIES (PER OPNAV INSTRUCTION 4860.7C, 7 JUNE 1999)

ISSUE: PROPOSED CHANGES TO THE A-76 CIRCULAR

- PROPOSED CHANGES
  - INHERENTLY GOVERNMENTAL ACTIVITIES: THE DEFINITION OF WHAT QUALIFIES HAS BEEN NARROWED. POSITIONS ARE TO BE POSTED AND CAN BE CHALLENGED BY THE PUBLIC
  - THE TIME TO CONDUCT CA STUDY REDUCED TO ONE (1) YEAR AND SOLICITATION MUST BE ISSUED WITHIN EIGHT (8) MONTHS OF START

ISSUE: PROPOSED CHANGES TO THE A-76 CIRCULAR

- PROPOSED CHANGES
  - GOVERNMENT'S MEO MUST BE SUBMITTED AT SAME TIME AS COMMERCIAL PROPOSALS. FAILURE TO SUBMIT KNOCKS GOVERNMENT OUT OF CONTENTION
  - WHEN WORK IS RETAINED IN-HOUSE, NEW CA STUDY MUST BE COMPLETED ON THE POSITIONS EVERY 3-5 YEARS BASED ON TIME SET FORTH IN SOLICITATION

ISSUE: PROPOSED CHANGES TO THE A-76 CIRCULAR

- LESSONS LEARNED
  - PROPOSED REGULATIONS ARE NOT FINAL
  - KEEP ABREAST OF DEVELOPMENTS AND BE PREPARED TO IMPLEMENT
  - PROPOSED REGULATIONS PROVIDE NO GUIDANCE ON HOW THEY ARE TO BE IMPLEMENTED FOR ON-GOING STUDIES
  - KEEP EMPLOYEES APPRISED OF ACTUAL AND PROPOSED CHANGED TO REDUCE SURPRISE AND STRESS ON EMPLOYEES